



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Ministry of Public Safety and Solicitor General

DECISION

Dispute Codes OPR MNR FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain an Order of Possession for unpaid rent, a Monetary Order for unpaid rent, and to recover the cost of the filing fee from the Tenant for this application.

Service of the hearing documents, by the Landlord to the Tenant was completed on January 26, 2011 via registered mail. Canada Post receipts were provided in the Landlord's evidence. The Tenant is deemed to have received the hearing documents on January 31, 2011, in accordance with section 90 of the Act.

The Landlord appeared, gave affirmed testimony, was provided the opportunity to present their evidence orally, in writing, and in documentary form.

Issues(s) to be Decided

1. Has the Tenant breached the *Residential Tenancy Act*, regulation, or tenancy agreement?
2. If so, has the Landlord met the burden of proof to obtain an Order of Possession and a Monetary Order as a result of that breach?

Background and Evidence

The parties entered into a fixed term tenancy agreement effective August 1, 2006 and switched to a month to month tenancy after July 31, 2007. Rent is payable on the first of each month in the amount of \$968.83. \$420.00 was paid by the Tenant on July 11, 2006 for the security deposit.

The Landlord testified that this Tenant continually pays her rent with several smaller payments throughout each month. As of January 4, 2011 there was an outstanding balance owing of \$955.56 for January 1, 2011; so the Landlord personally served the Tenant with a 10 Day Notice to End Tenancy for unpaid rent on January 4, 2011.

The Tenant has made the following payments since being served with the 10 Day Notice:

January 10, 2011	\$540.00
January 27, 2011	\$415.56
February 7, 2011	\$500.00
February 8, 2011	\$286.73

The Landlord stated that the Tenant was issued the debit machine receipts for her payments. The current outstanding balance due is \$168.83 for February 1, 2011 rent.

Analysis

I have carefully considered the Landlord's testimony and evidence which included, among other things, a copy of the tenancy agreement and a copy of the 10 Day Notice to End Tenancy dated January 4, 2011.

I find that in order to justify payment of damages or losses under section 67 of the *Act*, the Applicant Landlord would be required to prove that the other party did not comply with the *Act* and that this non-compliance resulted in costs or losses to the Applicant Landlord pursuant to section 7.

In this instance, the burden of proof is on the Landlord to prove the existence of the damage/loss and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the Tenant.

Order of Possession- A Notice to End Tenancy can be waived and a new or continuing tenancy created, only by the express or implied consent of both parties. The question of waiver usually arises when a landlord has accepted rent from a tenant after the Notice to End Tenancy has been served. If the rent is paid for the period during which the tenant is entitled to possession, that is, up to the effective date of the Notice to End Tenancy, no question of "waiver" can arise as the landlord is entitled to that rent.

In these circumstances the Landlord was able to accept rent for the period up to January 14, 2011, without waiving the 10 Day Notice to End Tenancy. The Landlord was entitled to collect rent of \$445.90 for the period between January 01, 2011 and January 14, 2011, which is calculated at a daily rate of \$31.85.

If the landlord accepts rent for the period after the effective date of the Notice to End Tenancy, the intention of the parties will be in issue. In these circumstances the

Landlord had accepted rent of \$955.56 that was due for January 2011 plus \$800.00 for February 1, 2011, which exceeds the amount that was due by January 14, 2011 and did not provide the Tenant receipts for "use and occupancy only" to inform the Tenant of the Landlord's intent not to wave the 10 Day Notice.

Based on the aforementioned I find the Landlord has waived the 10 Day Notice and reinstated the tenancy; therefore the 10 Day Notice to End Tenancy issued January 4, 2011 is void and I dismiss the Landlord's request for an Order of Possession.

Claim for unpaid rent. The Landlord claims for unpaid rent of \$168.83 for the balance owing for February 1, 2011, pursuant to section 26 of the *Act* which stipulates a tenant must pay rent when it is due. I find that the Tenant has failed to comply with a standard term of the tenancy agreement which stipulates that rent is due monthly on the first of each month. After reviewing the evidence I find the Landlord has met the burden of proof and I hereby approve their request for a monetary order of **\$168.83**.

The Landlord has partially succeeded with their application, therefore I award recovery of the **\$50.00** filing fee.

Conclusion

The 10 Day Notice to End Tenancy issued January 4, 2011 is HEREBY CANCELLED and is of no force or effect.

A copy of the Landlord's decision will be accompanied by a Monetary Order for **\$218.83** (\$168.83 + 50.00). The order must be served on the Respondent Tenant and is enforceable through the Provincial Court as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: February 16, 2011.

Residential Tenancy Branch